2024 Annual Conference

Niagara Falls, New York

Hearsay and Exceptions: An Advanced View

Date: Monday, September 23, 2024

Instructor:

Hon. Brian Rudner

MCLE: 1.0 SKILLS

This program has been approved for credit in New York State for all attorneys including those who are Newly Admitted (less than 24 months) and administered by the Onondaga County Bar Association

Timed Agenda

Course:	Hearsay and Exceptions: An Advanced View
Credit/Category:	1.0 Areas of Professional Practice
9:40 – 9:55:	Rule Against Hearsay; Origin and Purpose of Rule; Elements; Hearsay Considerations in Justice Court

9:55 – 10:25:	Exceptions to Rule Against Hearsay:
	- "Apparent Exceptions"
	- "Real Exceptions":
	  o Business Records
	  o Present Sense Impression
	  o Excited Utterance
	  o Declaration Against Penal Interest
	  o Admissions/Confessions

10:25 – 10:35:	Interplay of Sixth Amendment Confrontation Clause with Hearsay Exceptions
10:35 – 10:40:	Q&A

Brian Rudner is a Town Justice in the Town of East Fishkill, in Dutchess County. Mr. Rudner is also the principal court attorney to the Honorable Edward T. McLoughlin, Dutchess County Court Judge. Prior to his employment with Judge McLoughlin, Mr. Rudner served as the principal court attorney to the Honorable Peter M. Forman, Dutchess County Court Judge (Retired).

Mr. Rudner graduated St. John's University School of Law in 2001. He began his career as a prosecutor in the Office of the District Attorney, Bronx County. After leaving the DA's Office in 2008, Mr. Rudner worked in private practice, primarily in civil and criminal litigation, until being hired by Judge Forman in 2019. Mr. Rudner is admitted to practice law in New York.

HEARSAY AND EXCEPTIONS: AN ADVANCED VIEW

Presented by the Hon. Brian M. Rudner, Town Justice, Town of East Fishkill, and Law Clerk to the Hon. Edward T. McLoughlin, Dutchess County Court

WHAT WE WILL BE DISCUSSING TODAY:

1. Origin and purpose of the rule against hearsay
2. What is hearsay? / Elements?
3. Rule against hearsay – applicability in Justice Court proceedings

WHAT WE WILL BE DISCUSSING TODAY:

4. Exceptions:
   - apparent exceptions
   - real exceptions
5. Interplay of Sixth Amendment Confrontation Clause

(Crawford v. Washington) with exceptions to the rule against hearsay.

▸ HEARSAY – DEFINED

The exclusion of hearsay is perhaps the best-known feature of Anglo-American law

(People v. Caviness, 38 NY2d 227 [1975], citing Fisch, New York Evidence, §756)

▸How do we define hearsay?

- ▸ An out of court statement of a declarant
- ▸ Offered in court as evidence
- ▸ To prove the truth of the matter asserted in the out of court statement

▸People v. Nieves, 67 NY 2d NY2d 125, 131 [1986]

▸Richardson, Evidence §8-101 [Prince, 11th Ed.]

▸Purpose/Origin of the Rule

▸The adversary of the party offering the out-of-court statement is afforded no opportunity to cross-examine the declarant or impeach his credibility.

▸People v. Settles, 46 NY2d 154 (1978).

"Declarant"

The speaker/maker of the out of court statement:

- A person who is not a witness in the court proceeding; or
- If the declarant is a witness, the witness seeks to testify about his or her own extrajudicial statement

"Declarant"

- Because a declarant is a "person", any statement generated from mechanical sources, other than data inputted by a human being and subsequently retrieved, will not be hearsay:

  People v. Stultz, 284 AD2d 350 [2d Dept. 2001]

  Testimony regarding the telephone caller ID number displayed on victim's cell phone

Observations of video:

People v. Ham, 43 Misc3d 1227(A) (Crim Ct, Kings County, 2014) (complainant's statement about what he observed on a videotape is not hearsay)

People v. Ogando, 64 Misc3d 310 (Crim Ct, NY County, 2019) [Merely stating what one sees on a video which has no audio and includes no nonverbal assertions does not constitute hearsay]

People v. Patten, 32 Misc3d 440 (City Court, Long Beach, 2011)

"Statement"

A statement within the definition of hearsay can be verbal, written or oral, or non-verbal

Non-verbal conduct is subject to the hearsay rule when all of the circumstances demonstrate the act was "intended to serve as an expressive communication" (People v. Salko, 47 NY2d 230 (1979); see also People v. Caviness, 38 NY2d 227 (1975) ["... non- verbal conduct of a person intended by him as a substitute for words in expressing the matter stated"]).

People v. Spicola, 16 NY3d 441, 452 n.2 (2011)
People v. Esteves, 152 AD2d 406 (2d Dept. 1989)
People v. Madas, 201 NY 349 (1911)

Hearsay considerations in Justice Court

1. Each information must be reviewed for sufficiency

- CPL §100.40[1][c] = to be sufficient a complaint must contain "non-hearsay allegations" which "establish, if true, every element of the offense charged and the defendant's commission thereof."

Hearsay considerations in Justice Court

People v. Jones, 77 Misc3d 5 (App. Term, 2nd, 11th, and 13th Jud Depts, 2022)

- Police officer stated in information that he viewed surveillance video depicting the incident and observed person he recognized as the defendant strike the victim
- information found sufficient
- "A statement in an accusatory instrument that the deponent recognized the defendant is not conclusory and any questions as to the source of the deponent's knowledge is a matter to be raised at trial."

2. Small Claims proceedings:

- Not bound by substantive rules of evidence except for those governing privileged communications or communications with a decedent (Uniform Justice Court Act §1804)
- But a small claims judgment cannot be based on hearsay alone

Levins v. Bucholtz, 2 AD2d 351 (1st Dept. 1956)
Mark v. Dutchess Jeep Chrysler Dodge, 79 Misc3d 128(A) (App Term, 9th and 10th Judicial Districts, 2023)

3. Preliminary Hearings:

Criminal Procedure Law §180.60[8]: "... only non-hearsay evidence is admissible to demonstrate reasonable cause to believe that the defendant committed a felony ..."

4. Pre-Trial Motions in Limine

HEARSAY EXCEPTIONS

- "Apparent" Exceptions
  - No out-of-court statement is inherently hearsay; whether statement is hearsay turns on the purpose for which it is offered.

HEARSAY EXCEPTIONS

- A statement not offered to prove the truth of the matter asserted therein is not hearsay. Such a statement is sometimes referred to as an "apparent exception" to the hearsay rule.

HEARSAY EXCEPTIONS

- Examples:
  - Prior inconsistent statement of a witness
    - Not offered to show truth of prior inconsistent statement
    - Offered merely to show it was made and inconsistent with what testified to at trial
  - A statement which provides an explanation for conduct of police officer

HEARSAY EXCEPTIONS

- Examples:
  - State of mind – the mere utterance of a statement, without regard to its truth, may indicate circumstantially the state of mind of the hearer or of the declarant.
    - People v. Harris, 209 NY 70 (1913)

HEARSAY EXCEPTIONS

- Examples:
  - "Prompt outcry" – timely complaint by victim of a sexual assault
  - Other examples?

"Real" Exceptions

1. Business Records – CPLR 4518

Governed by CPLR 4518[a]. Four foundational elements to admit a business record ("any writing or record, whether in the form of an entry in a book or otherwise"):

i. Record was made in the regular course of business;
   a. Routine, regularly conducted business activity
   b. Needed and relied upon in the performance and function of the business

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"Real" Exceptions

ii. It is the regular course of such business to make the record;
   a. Record must be made pursuant to established procedures for the routine, habitual, systematic making of such a record

"Real" Exceptions

iii. Record is made at or about the time of the events being recorded; and

iv. Unless some other hearsay exceptions is available, may only be granted where it is demonstrated that the informant has personal knowledge of the act, event, or condition, and that he is under a business duty to report it to the entrant.

a. If the informant was not under a business duty to impart the information, but the entrant was under a business duty to obtain and record the statement, the entry is admissible to establish merely that the statement was made.

b. Another hearsay exception would be required to receive the statement for its truth.

People v. Blanchard, 177 AD2d 854 (3d Dept. 1991)

People v. Ortega, 15 NY3d 610 (2010)

People v. Kennedy, 68 NY2d 569 (1986)

People v. Bodendorf, 52 Misc3d 551 (Town of Lagrange Just Ct 2016)

CPLR 4518 [c]: creates a hearsay exception and certification procedure for three types of business records:

- Medical records of a hospital or government entity concerning the condition and treatment of a patient
- Records of a library
- Records of a department or bureau of a municipal corporation or of the state

2. Present Sense Impression:

i. Statements that are made by a person perceiving an event as it is unfolding or immediately afterward; and
ii. Corroborated by independent evidence establishing the reliability of the contents of the statement.

People v. Cantave, 21 NY3d 374 (2013)

These statements are deemed reliable "because the contemporaneity of the communication minimizes the opportunity for calculated misstatement as well as the risk of inaccuracy from faulty memory"

People v. Vasquez, 88 NY2d 561 (1996)

Contemporaneity Requirement

- Need not be "precisely simultaneous"
- Must be made "substantially contemporaneously" with observations
- Must be a *present* sense impression rather than recalled description of events observed in recent past

Time lag of *a few seconds* after the event ended and statement made is acceptable. People v. Haskins, 121 AD3d 1181 (3d Dept. 2014).

But a delay of *seven minutes* is too long. People v. Demand, 268 AD2d 901 (3d Dept. 2000).

Corroboration Requirement

- Depends on the particular circumstances of each case
- Proponent of the statement must demonstrate "some independent verification of the declarant's descriptions of the unfolding events" (Vasquez at 575).

- Corroboration by "an equally percipient witness" is not required (People v. Brown, 80 NY2d 729, 735-737 [1993]).

- Critical inquiry is "whether the corroboration ... truly serves to support its substance and content" (Vasquez at 576).

People v. Deverow, 38 NY3d 157 (2022)
People v. Williams, 52 Misc3d 141(A) (App Term, 2nd, 11th, & 13th Jud Districts)
People v. Miley, 63 Misc3d 159(A) (App Term 2019)
People v. Gil, 64 Misc3d 135(A) (App Term 2019)
People v. Long, 34 Misc3d 151(A) (App Term, 9th & 10th Jud Districts)

3.Excited Utterance

(A "close relative" of the present sense impression exception)

i. A statement about a startling or exciting event
ii. Made by a participant in, or person who personally observed, the event
iii. Provided the statement was made under the stress of excitement caused by the external event, and not the product of studied reflection and possible fabrication

3.Excited Utterance

Present sense impression = contemporaneity and corroboration

Excited utterance = spontaneity and excited mental state

3.Excited Utterance

("The court must assess not only the nature of the startling event and the amount of time which has elapsed between the occurrence and the statement, but also the activities of the declarant in the interim to ascertain if there was significant opportunity to deviate from the truth." People v. Edwards, 47 NY2d 493, 497 (1979).

That statements were made in response to an inquiry does not disqualify them as excited utterances but rather is a fact to be considered by the trial court. Edwards at 498-499

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If the hearsay declarant is also a witness at the trial, that factor favors admissibility of the hearsay statement because of the opportunity to verify and test the statements' trustworthiness. People v. Buie, 86 NY2d 501, 512 (1995).

People v. Caviness, 38 NY2d 227 (1975)
People v. Sostre, 51 NY2d 958 (1980)
People v. Brooks, 71 NY2d 877 (1988)
People v. Johnson, 1 NY3d 302 (2003)
People v. Ortiz, 198 AD3d 924 (2d Dept. 2021)
People v. Minton, 52 AD3d 234 (1st Dept. 2008)
People v. Shah, 58 Misc3d 95 (App Term, 9th & 10th Jud Dists)

4. Declaration Against Penal Interest

i. Declarant must be unavailable to testify by reason of death, absence from jurisdiction, or refusal to testify on constitutional grounds;

ii. Declarant must be aware at the time of its making that the statement was contrary to his penal interest;

4.Declaration Against Penal Interest

iii. Declarant must have competent knowledge of the underlying facts; and
iv. There must be sufficient competent evidence – *independent of the declaration* – to assure its trustworthiness and reliability.

People v. Brensic, 70 NY2d 9 (1987)

4.Declaration Against Penal Interest

Theory behind the exception = reliability is assured because a person ordinarily does not reveal facts that are contrary to his own interest.

4. Declaration Against Penal Interest

Where the statement exposes the declarant to criminal liability and is offered *against* the defendant:

i. Court must find that the interest compromised is "of sufficient magnitude or consequence to the declarant to all but rule out any motive to falsify." Brensic, 70 NY2d at 16.

ii. Where the People seek to introduce declaration against penal interest of an unavailable third party *through testimony of in-court witness*, and the defendant claims such evidence is unreliable, the trial court should conduct hearing outside hearing of the jury.

iii. If, after the hearing, the Court decides to allow such evidence, it should admit only that portion of the declarant's statement which is opposed to the declarant's interest.

iv. Court should give proper limiting instruction and instruct jury on the use of such evidence during final jury charge.

Can we think of reasons why someone would make a statement seemingly against his/her penal interest that was not true?

See People v. Settles, 46 NY2d 154 (1978).
People v. Shortridge, 65 NY2d 309 (1985).

Where the statement exposes the declarant to criminal liability and is offered *to exculpate* the defendant:

> There must be some evidence, independent of the declaration itself, which establishes a reasonable possibility that the statement might be true. See People v. Soto, 26 NY3d 455 (2015).

People v. Shabazz, 22 NY3d 896 (2013)
People v. Smith, 214 AD3d 1424 (4th Dept. 2023)
People v. Williams, 211 AD3d 1055 (2d Dept. 2022)
People v. Ellis, 198 AD3d 674 (2d Dept. 2021)
People v. Hunter, 171 AD3d 1534 (4th Dept. 2019)

5. Admissions / Confessions

"Admissions by a party of any fact material to the issue are always competent evidence against him, wherever, whenever, or to whomsoever made." Reed v. McCord, 160 NY 330 (1899).

In a criminal proceeding, a confession is a direct acknowledgement of guilt made by the accused.
People v. Kingston, 8 NY2d 384 (1960).

Admissions Distinguished from Declarations Against Penal Interest

i. Admission must appear to be against the interest of the party at the time of trial, but need not be against the party's interest at the time it was made.
ii. Declaration against interest may be induced into evidence by or against anyone, whereas an admission may be used only against the declarant. Declaration against interest may only be introduced when the declarant is unavailable.

Criminal Procedure Law §60.45 = Statements of defendants, whether considered admissions or confessions, are inadmissible if involuntarily made. A statement is involuntarily made within the meaning of §60.45 if it is inadmissible:

i. Under the traditional involuntary confession rule
ii. Pursuant to *Miranda v. Arizona*
iii. Under the New York right to counsel rules

Judicial Admissions – Formal v. Informal

Formal Judicial Admissions

A party may admit the truth of facts in issue in an action that would thereby be conclusive of the facts admitted in that action.

"A controversy put out of the case by the parties is not to be put into it by us." People v. Robinson, 284 NY 75 (1940).

Examples:

A plea of guilty in a criminal proceeding.

- May be used against the defendant in a subsequent civil proceeding
- But a plea of guilty that is withdrawn with the Court's permission may not be used against the defendant in that criminal case, either on the People's direct case or for impeachment.
  People v. Spitaleri, 9 NY2d 168 (1961) (a plea of guilty, once withdrawn, "is out of the case forever and for all purposes").

- This rule applies to the admissions made during the plea allocution and the fact that defendant pled and then withdrew the plea

In a civil proceeding: "Facts admitted in a party's pleadings constitute formal judicial admissions, and are conclusive of the facts admitted in the action in which they are made." GMS Batching, Inc. v. Tadco Constr. Corp., 120 AD3d 549 (2d Dept. 2014).

Informal Judicial Admissions

A declaration made by a party in the course of any judicial proceeding (whether in the same or another case) inconsistent with the position the party now assumes. Such an admission is not conclusive on the defendant in the litigation but is merely evidence of the fact or facts admitted.

People v. Brown, 98 NY2d 226 (2002).

Informal judicial admission by a party's attorney:

i. Attorney was authorized to speak on party's behalf;
ii. Party was the source of the information conveyed by attorney; and
iii. Party expressly or impliedly waived attorney-client privilege.

Examples:

i. Statements by attorney at arraignment
People v. Castillo, 94 AD3d 678 (1st Dept. 2012)
People v. Gary, 44 AD3d 416 (1st Dept. 2007)
People v. Killiebrew, 280 AD2d 684 (2d Dept. 2001)

ii. Statements by attorney at bail hearing

People v. Johnson, 46 AD3d 276 (1st Dept. 2007)

iii. Statements in an affidavit in the same proceeding

People v. Rivera, 58 AD2d 147 (1st Dept. 1977), affirmed 45 NY2d 989

Informal Judicial Admission by Conduct

The refusal to submit to a blood alcohol test may be considered conduct constituting circumstantial evidence of consciousness of guilt.
People v. Thomas, 46 NY2d 100 (1978).

- "refusal" is relevant because of the inference it permits that defendant refused to take the test because of his apprehension as to whether he would pass it

Evidence of threats made by defendant against one of the People's witnesses is admissible on the issue of consciousness of guilt.
People v. Larregui, 164 AD3d 1622 (4th Dept. 2018)
People v. McCommons, 143 AD3d 1150 (3d Dept. 2016)

value outweighs

- Before admitting, must determine that probative potential for prejudice.

Bruton Issues – Multiple Defendants

The admission of a statement made by one defendant, who does not testify, containing references implicating a co-defendant, violates the co-defendant's right to cross-examination guaranteed by the confrontation clause of the Sixth Amendment.

Bruton v. United States, 391 US 123 (1968).

Any such statement is inadmissible at a joint trial, unless the implicating references can be effectively deleted.

ADMISSIBILITY LIMITED BY CONFRONTATION CLAUSE

Crawford v. Washington, 541 US 36 (2004)

The Confrontation Clause of the Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

ADMISSIBILITY LIMITED BY CONFRONTATION CLAUSE

It thus limits the admissibility of "testimonial" hearsay statements that may otherwise be admissible under state law ...

... unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination.

ADMISSIBILITY LIMITED BY CONFRONTATION CLAUSE

A hearsay statement is "testimonial" when it consists of:

i. Prior testimony at a preliminary hearing, before a grand jury, or at a former trial;

ii. An out-of-court statement in which:
   a. State actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial; or

b. Absent a formal interrogation, the circumstances demonstrate that the "primary purpose" of an exchange was to procure an out-of-court statement to prove criminal conduct or past events potentially relevant to a later criminal prosecution, or otherwise substitute for trial testimony.

People v. Pacer, 6 NY3d 504 (2006)
In prosecution for aggravated unlicensed operation of a motor vehicle, introduction of DMV affidavit to prove defendant knew or had reason to know his driving privileges had been revoked was found to be "testimonial."

A statement made to the police is not testimonial when made in the course of a police interrogation under circumstances objectively indicating that the primary purpose of the investigation is to enable police assistance to meet an ongoing emergency.

People v. Nieves-Andino, 9 NY3d 12 (2007)
People v. Coleman, 16 AD3d 254 (1st Dept. 2005)
People v. Long, 34 Misc3d 151 (A) (App Term, 9th & 10th Jud Dists, 2012)

A defendant's guilty plea allocution that implicates a co-defendant is testimonial and may not be admitted at the trial of the co-defendant absent a prior opportunity for the co- defendant to cross-examine the defendant.

People v. Hardy, 4 NY3d 192 (2005)
People v. Douglas, 4 NY3d 777 (2005)

Confrontation Clause is violated by the introduction of a blood test report through the testimony of an analyst who was familiar with the general testing procedure, but who had neither observed nor reviewed the analysis of the defendant's blood.

Bullcoming v. New Mexico, 564 US 647 (2011)

People v. Hao Lin, 28 NY3d 701 (2017)

- DWI prosecution
- Retired police officer performed the breath test
- Officer who testified at trial observed him "perform all of the steps on the checklist and saw the breathalyzer machine print out the results."
- Testifying officer (who was also a trained and certified operator) was a suitable witness to testify about the testing procedure and results
- No Confrontation Clause violation found

But see People v. Flores, 62 Misc3d 46 (App Term, 2018)

Admission of 12-step breath test preparation checklist, initialed and signed by tester, who died after administering the test and prior to trial, violated the Confrontation Clause. Unlike in Hao Lin, no witness observed the testing procedure.

Documents pertaining to the routine inspection, maintenance, and calibration of breathalyzer machines are nontestimonial, and thus not subject to Confrontation Clause.

People v. Pealer, 20 NY 3d 447 (2013)

Valuable Resource:

"Guide to NY Evidence"

Bench Book

https://www.nycourts.gov/judges/evidence/index.shtml

- QUESTIONS?